92-1842

No. ..

Supreme Court, U.S.
FILED
MAY 1 8 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

NORMAN DOE,

Petitioner,

vs.

ENTERGY SERVICES, INC.,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Louisiana

PETITION FOR WRIT OF CERTIORARI

NORMAN DOE
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QUESTIONS PRESENTED FOR REVIEW

I. Can a state court of last resort abridge the traditional right of personal security by its decision not to allow a petitioner to present evidence of his case?

II. Must courts apply laws as they are written by the legislature or may they constitutionally reinterpret statutes in a manner which interferes with the right of personal security?

III. Did the Supreme Court of Louisiana violate the due process clause of the Fourteenth Amendment, United States Constitution, by its refusal to allow petitioner to present evidence of equity considerations in his case?

LIST OF PARTIES

A. The following are entities interested in the outcome of this case:

The parties to the proceedings below were the petitioner, "Norman Doe", and the respondent, Entergy Services, Inc.

B. The following are names of opposing law firms and/or counsel in this case:

Petitioner is representing himself in the premises.

Counsel for Respondent, Entergy Services, Inc., is Elena C. Goletz, Entergy Services, Inc., P.O. Box 61000, New Orleans, Louisiana 70161.

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No.

In the

Supreme Court of the United States

October Term, 1992

NORMAN DOE,

Petitioner,

vs.

ENTERGY SERVICES, INC.,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Louisiana

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Judgment was rendered in this case by the Honorable Max N. Tobias, Jr., Judge, Civil District Court for the Parish of Orleans, Division "L", State of Louisiana, on October 7, 1991, in the matter numbered 91-14479 on the docket of the court (Appendix D).

The Court of Appeal, Fourth Circuit, State of Louisiana, rendered its Opinion on November 13, 1992, which affirmed the judgment of the lower court, in the matter numbered 91-CA-2540 on the docket of the court (Appendix C).

The Court of Appeal, Fourth Circuit, State of Louisiana, then denied petitioner's Application for Rehearing on December 16, 1992 (Appendix B).

The Supreme Court of Louisiana then denied petitioner's Application for Writ of Certiorari on February 19, 1993, in the matter numbered 93-C-0125 on the docket of the court (Appendix A).

STATEMENT OF JURISDICTION

The Court of Appeal, Fourth Circuit, State of Louisiana, denied petitioner's application for rehearing on December 16, 1992. The Supreme Court of Louisiana then denied petitioner a Writ of Certiorari on February 19, 1993.

This Petition for Writ of Certiorari was filed within 90 days of February 19, 1993, as required by 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.4. Jurisdiction is proper under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Civil Code of Louisiana, Article 4, which reads as follows:

> When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.

STATEMENT OF THE CASE

This case arises out of a matter in which the trial court in a civilian jurisdiction refused to employ familiar and codified

concepts of "equity" in a case where not only was the positive law of that particular jurisdiction silent, but both codal and decisional law of the said civilian jurisdiction mandated the use of equity in deciding the case.

Although certainly not the typical circumstance in American civil law, the State of Louisiana allows for the utilization of certain "Common Law" concepts, such as "equity" in this instance, within its admittedly civilian law scheme.

In this case, petitioner was denied the mandated use of that particular Common Law concept in the decision of his case, thus inviting review by this Honorable Court.

Petitioner is employed by the respondent, a corporation and private employer. The respondent has maintained a record of his employment (*i.e.*, a personnel "file"). Although the petitioner currently remains employed by the respondent, he has repeatedly asked it for an opportunity to discover, confirm and refute its contents, since he has been informed that it contains information which is derogatory, wholly unrelated to his employ. :nt or job duties, and which is extremely erroneous. The respondent insists on maintaining certain information within the file despite polite requests by the petitioner for its removal but will not allow him to cleanse the record by introducing into it correct information.

By refusing to allow the petitioner to remove irrelevant and offensive information from his file, the respondent endorses and exhibits a corporate policy of distrust toward its employees, of unnecessary intrusion into their private lives, and to collection of data about is employees without due regard for its accuracy.

The respondent has maintained that the subject information is not routinely made available to third parties but in this case the

petitioner is not a third party but the victim of corporate arrogance and the cavalier exercise of record-keeping authority.

At no time whatsoever has petitioner herein sought, either by judicial or extra-judicial means, to remove from his "file" those informational items related to the performance of his employment.

On August 5, 1991, petitioner filed a Petition in the Civil District Court for the Parish of Orleans, State of Louisiana, in which he sought as relief the opportunity to inspect the subject file and to remove the allegedly offensive information contained therein. The respondent filed a Peremptory Exception of No Cause of Action, the granting of which by the trial court dismisses the petitioner's action as in nonsuit.

The trial court granted the said Exception and dismissed the Petition by its Judgment of October 7, 1991 (Appendix D).

Petitioner timely filed a Petition for Appeal in the Court of Appeal, Fourth Circuit, State of Louisiana, on November 5, 1991: the Court of Appeal affirmed the trial court by its Opinion of November 13, 1992 (Appendix C). He then requested a Rehearing on November 30, 1992, and which was denied on December 4, 1992 (Appendix B). Finally, petitioner filed an Application for Writ of Certiorari in the Supreme Court of Louisiana on January 14, 1993, and was denied review on February 19, 1993 (Appendix A).

REASONS FOR GRANTING THE WRIT

Your petitioner submits that this case presents compelling reasons for the granting of certiorari.

When legislatively codified standards of judicial resolution of civil matters are not followed, the traditional result is not only substantial injustice but denial of constitutional rights.

Although this Honorable Court is the national repository of judge-made law, in Louisiana, the law is "civilian" in its origin and is a formal expression of legislati 'e will. In this case, a trial judge within that civilian scheme was bound by the law of Louisiana to resort to "equity" where positive (i.e., codified) law was silent. Curiously, when the situation presented itself, the court refused to follow the mandate.

The trial court erroneously applied codified Louisiana civil law which irrefutably was written by the legislature in clear and unambiguous words, thus depriving petitioner of justice, the right to present his evidence in the case, and of the exercise of his right of due process via the Fourteenth Amendment to the Constitution of the United States.

No evidence of custom or prevailing usages was heard in this case which is essential to due process. Inasmuch as the Supreme Court of Louisiana did not allow such evidence to be presented, it thereby interfered with petitioner's protection of reputation, which traditionally has been held to be a protected property right by our courts.

ARGUMENT

I. The Supreme Court of Louisiana abridged the traditional right of personal security by state action by its decision not to allow petitioner to present evidence of his case.

II. The Supreme Court of Louisiana unconstitutionally interpreted a Louisiana statute in a manner which interfered with his right of personal security.

III. The Supreme Court of Louisiana violated the due process clause of the Fourteenth Amendment, United States Constitution by its refusal to allow petitioner to present evidence of equity considerations in his case.

Petitioner submits that the right of personal security is protected by the Fourteenth Amendment and that a state may not abridge that right by decisional law. The right to maintain a good reputation is among the personal security rights afforded constitutional protection, even without the allegation of special or economic damage. 16 *Corpus Juris Secundum* 511, at 625. Where a court refuses to allow a litigant to present evidence affecting his right of personal security, this action is a state act which compels review by this constitutional court. It is well-settled that this right may be ". . . invaded not only by a deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual." *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 2 S.E. 2d 810 (Court of Appeals of Georgia, Division No. 2), 1939, at 816. In this case, both petitioner and respondent agreed that no positive Louisiana law existed on the subject of an employee's right to purge irrelevant and useless information from his employment record.

However, of much greater significance, the trial court also agreed that no positive law existed and said so in its Judgment

(Appendix D). It then held that petitioner could not present his own case on custom and prevailing usages *because* no positive law existed. The trial court substituted its own interpretation of the Louisiana Civil Code in lieu of the unambiguous legislative mandate. Article 4 of the Civil Code provides:

> When no rule for a particular situation can be derived from legislation or custom, the court is *bound* to proceed according to equity. To decide equitably, *resort is made to justice, reason, and prevailing usages.*

(Emphasis by petitioner; *Porterfield v. Spurgeon,* 379 So. 2d 56 (3rd Cir. C.A. 1979) at 60. In this case, the trial court held that since there was no positive law on the instant subject, equity would not then be used, thus preventing petitioner from putting on evidence of prevailing usages in his case.

Both the Louisiana Fourth Circuit Court of Appeal and the Supreme Court of Louisiana upheld this obvious reinterpretation of unambiguous statutory law. The effect of this error was to then interfere with petitioner's right to the security of his reputation, which thereby made the court action a state act which subjects it to the purview of this Honorable Court.

The persuasive force of classic decisional law is to the clear effect that laws are to be applied by all of our courts as written. *Diamond v. Chakrabarty,* 447 U.S. 303, 100 S. Ct. 2204 (1980) at 315, 2211; *United States v. Rutherford,* 442 U.S. 543, 99 S. Ct. 2470 (1979) at 555, 2477; *State v. Muller,* 365 So. 2d 464 (S. Ct. 1978) at 467; *Gulf Refining Co. of Louisiana v. Glassell,* 171 So. 846 (S. Ct. 1936) at 854. In this case, the Louisiana courts reinterpreted Louisiana codal norms as written by ignoring the plain meaning of the subject codal provision. This then subjects the

actions of these courts to this Honorable Court's purview since the final judgment of a state court which construes a state statute, however innocuous, so as to interfere with a property right, is the act of a state bringing it within the bounds of review. *Barney v. City of New York,* 193 U.S. 430, 24 S. Ct. 502 (1902) at 438, 504.

This Honorable Court has held that the right of a litigant to present evidence in a court of law is "essential" to due process. *Saunders v. Shaw,* 244 U.S. 317, 37 S. Ct. 638 (1917) at 319, 640. Federal appellate courts have held that:

> A ruling based on evidence which a party has not allowed to confront or rebut is one which denies due process.

Carter v. Morehouse Parish School Board, 441 F.2d 380 (5th Cir. C.A. 1971) at 382. This certainly is the reason for this Court to state that the opportunity to be heard "... must be granted at a meaningful time in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 85 S. Ct. 1187 (1965) at 552, 1191.

In this case, the refusal to allow petitioner to present his evidence regarding reason, justice and prevailing usages, in accord with the subject statute, as written, constituted a state court denial of his Fourteenth Amendment right of due process.

CONCLUSION

Petitioner, as an individual citizen, has a protected right of personal security to his reputation which has been abridged by the State of Louisiana through its Supreme Court and its lower appellate and trial courts. His due process rights are violated by the action of a state court reinterpretation of a statute which is plainly worded and should, therefore, be followed. the failure of these courts to do this unconstitutionally prevents petitioner from presenting evidence of his case. Accordingly, review by this Honorable Court becomes appropriate.

Respectfully submitted,

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APPENDIX A — DENIAL OF APPLICATION FOR WRIT OF CERTIORARI, SUPREME COURT OF LOUISIANA DATED FEBRUARY 19, 1993

THE SUPREME COURT OF THE STATE OF LOUISIANA

No. 93-C - 0125

NORMAN DOE

vs.

ENTERGY SERVICES , INC.

IN RE: Doe, Norman; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number 9ICA-2540; Parish of Orleans Civil District Court Div. "L" Number 91-14479

February 19, 1993

Denied.

PH

PFC

WFM

JLD

JCW

Appendix A

CDK

ROO

LEMMON, J., not on panel.

February 19, 1993

s/ Illegible

Clerk of Court
For the Court

APPENDIX B — DENIAL OF APPLICATION FOR REHEARING, FOURTH CIRCUIT COURT OF APPEAL, STATE OF LOUISIANA DATED DECEMBER 16, 1992

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

Clerk's Office, New Orleans, December 16, 1992

Dear Sir:

Rehearing was this day refused in the case entitled

NORMAN DOE v. ENTERGY SERVICES, INC.

No. 91-CA-2540

Very truly yours,

DANIELLE A. SCHOTT
CLERK OF COURT

APPENDIX C — OPINION, COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA DATED NOVEMBER 13, 1992

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NO. 91-CA-2540

NORMAN DOE

versus

ENTERGY SERVICES, INC.

APPEAL FROM
CIVIL DISTRICT COURT, FOR THE PARISH OF ORLEANS
NO. 91-14479, DIVISION "L"
HONORABLE MAX N. TOBIAS, JR., JUDGE

JOAN BERNARD ARMSTRONG
JUDGE
Court composed of Judge Philip C. Ciaccio, Judge Charles R. Ward and Judge Joan Bernard Armstrong)

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New Orleans, LA 70161
Attorney for Defendant/Appellee

AFFIRMED.

Appendix C

On appeal, plaintiff, Norman Doe ("Doe"), claims the trial court erred in granting the peremptory exception of defendant, Entergy Services, Inc. ("Entergy"), and in dismissing his petition for its failure to state a cause of action. Doe contends that his petition against his employer, to force the removal of certain documents from his personnel file and/or from the personnel files of his co-workers, sets forth a cause of action in equity. For the reasons which follow, we affirm the dismissal of his petition.

Plaintiff filed suit against his employer, Entergy, under the fictitious name of Norman Doe.[1] His petition alleges that he has worked for Entergy for more than six years. It also alleges that the personnel files which Entergy keeps on him, on co-workers Alphonse Jackson ("Jackson") and/or Debbie Travis ("Travis"), and possibly on others, contain certain documents with "complaints, allegations, alleged facts, and/or reports arising from or allegedly relating to either Alphonse Jackson and/or Debbie Travis." As the information is allegedly not necessary or relevant to his work function and could potentially cause damage if discovered by third-parties, Doe's petition seeks to have "all records sanitized; that is to remove records other than those type of records kept in the regular course of business, ie, [sic] the application form for the job or for promotions, the annual performance evaluations, . . . " His petition further seeks that "any reference to petitioner in a derogatory sense in any other file personnel or otherwise at [Entergy] be deleted and that the entire documentation be destroyed, (including any records of defendant's attorneys) such that there will be no trail of allegations made by these or other parties to petitioner." Contemporaneous with filing the petition, Doe also filed a motion for the production of the

---

1. To protect his privacy right, the trial court granted plaintiff's motion to use a fictitious name.

personnel records of himself, Jackson and Travis, and/or of any other files held by Entergy pertinent to this matter.

Entergy responded by excepting to Doe's petition on the ground that it fails to state a cause of action for which the law affords relief. Entergy asserted that, as an employer, the maintenance or removal of documents pertaining to an employee's workplace conduct or misconduct is solely within its purview. Louisiana's courts have implicitly recognized the employer's right to maintain disciplinary histories on employees. It contended that, when it is necessary to discipline or counsel an employee, employers have a legitimate interest in documenting employee counseling sessions for future reference.[2]

Entergy also filed a motion to quash Doe's motion for production of documents. Entergy alerted the court that it has previously, voluntarily provided Doe the right to examine his own personnel file with his attorney, which right he fully exercised. However, it objected to discovery of the personnel files of Travis and Jackson as those files are privileged. Entergy claimed that discovery of the co-workers' personnel files would have violated their privacy rights.

After trying Entergy's peremptory exception raising the objection of no cause of action and the motion to quash the request for production of documents, the trial court granted the exception

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2. Even though the information is not pertinent to its exception, because the exception must be tried on the face of the pleadings, Entergy defended its personnel file on Doe with the assertion that Doe was counseled for behavior which Entergy found inappropriate in the workplace and it recorded the counseling in his personnel file.

and dismissed the suit at Doe's cost. The court indicated that Doe could cite no law which authorized the relief he sought. In absence of positive law, the court found for defendant. The ruling rendered the motion to quash moot.

Doe's appellate brief claims the trial court erred in granting the exception since his petition sets forth a cause of action in equity. Specifically, he claims the trial court erred in granting the exception because he has a right 1) to obtain and copy his employment records; 2) to have "his records sanitized after some reasonable period of time;" 3) to have any false and scandalous materials mentioning his name removed from his employer's records; 4) to file in his personnel file and/or other records of his employer, his version of an alleged wrong; and 5) to receive notification prior to the disbursement to third parties any corporate records referencing his name. He also claims the trial court erred in granting the motion to quash.

The purpose of the peremptory exception raising the objection of no cause of action is to determine the legal sufficiency of the petition. No evidence may be offered at any time to support or controvert the exception. LSA-C.C.P. art. 931; *Smith v. Cole*, 553 So. 2d 847 (La. 1989). The exception is tried on the face of the pleadings and the court accepts the facts alleged in the petition as true, determining whether the law affords any relief to plaintiff if those facts are proved at trial. LSA-C.C.P. art 927; *Smith v. Cole, supra.; Robinson v. North American Royalties, Inc.*, 470 So. 2d 112 (La. 1985).

Under these precepts, several of Doe's appellate arguments are not germane to our review. Doe's petition does not raise allegations relative to his right to obtain and copy his employment records; to file in his personnel employment file and/or other

records of his employer, his version of an alleged wrong; to have any "false and scandalous materials" mentioning his name removed from his employer's records; or to receive notification prior to the disbursement to third parties any corporate records referencing his name. As the exception is tried on the face of the pleadings, the merits of his arguments on those issues are not pertinent to determining whether the trial court erred in finding his petition fails to state a cause of action.

Doe's petition alleges that his personnel file and those of Jackson and/or, Travis, and possibly on others, contain certain documents with "complaints, allegations, alleged facts, and/or reports arising from or allegedly relating to either [Jackson] and/or [Travis]." He alleges the information is not necessary or relevant to his work function and could cause him damage if discovered by third-parties. Therefore, he requests that all of Entergy's records referencing him be "sanitized" so there will be "no trail of allegations made by these or other parties to petitioner." He claims a right, based in equity, to purge his personnel file of all information regarding complaints and allegations against him which could potentially cause him damage if discovered by third parties.

In Louisiana, the sources of law are legislation and custom. LSA-C.C. art. 1. Legislation is a solemn expression of legislative will. LSA-C.C. art. 2. It is the superior source of Louisiana law. LSA-C.C. art. 1, Revision Comment § A. Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. LSA-C.C. art. 3. When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To resolve matters equitably, the court resorts to justice, reason and prevailing usages. LSA-C.C. art. 4. According to civilian doctrine, legislation and

custom are primary sources of law, in contrast to the secondary sources of law — jurisprudence, doctrine, conventional usages and equity — which may guide courts in reaching a decision in the absence of legislation and custom. LSA-C.C. art. 1, Revision Comments § B. Equity is a norm of order, and not included within the term "law." See Pascal, "The Sources of Civil Order According to the Louisiana Civil Code," 54 Tul.L.Rev. 916 (1980).

Our legislature has not enacted rules of law on the maintenance and contents of employer personnel files on employees. But see LSA-R.S. 44:1 *et seq.*, Public Records; LSA-R.S. 17:1231 *et seq.*, School Employee Personnel Files. However, from long practice and the conviction that the practice has the force of law it is custom and, therefore, law that employers have the right to maintain personnel files on their employees. It is also custom and, therefore, law that employers are entitled to document in an employee's personnel file the occupational conduct/misconduct, reprimands, counseling sessions, violations, complaints, etc., of the employee. For example, see *Smith v. Dept. of Health & Human Resources,* 408 So. 2d 411 (La. App. 1st Cir. 1981) [extensive disciplinary history was basis for higher degree of punishment meted out to one employee but not another]; *Schlesinger v. Adm'r of Office Employment Sec. Dept. of Labor,* 583 So. 2d 100 (La. App. 3d Cir. 1991) [plaintiff's personnel file documented four counseling sessions regarding misconduct]; *Johnson v. Whitfield,* 521 So. 2d 641 (La. App. 1st Cir. 1988). See also *Rozas v. Dept. of Health & Human Resources,* 522 So. 2d 1195 (La. App. 4th Cir. 1988), *writ den.,* 523 So. 2d 1338 (La. 1988); *Henderson v. Guillory,* 546 So. 2d 244 (La. App. 2d Cir. 1989), *writ den.,* 551 So. 2d 635 (La. 1989); *Kelly v. Whitfield,* 546 So. 2d 289 (La. App. 3d Cir. 1989).

Correlative to its right to maintain personnel files on its

employees, is the employer's right to determine the contents and the elimination of the contents of those files. It is custom that it is the employer's purview to decide when to remove stale or unnecessary documentation from employee records. As custom regulates the issue, it is unnecessary for us to contrive secondary law on the subject by resorting to equity.

Doe's petition does not allege that the documents he seeks to have removed from Entergy's employment records are false or defamatory. Rather, it alleges the documents contain "complaints, allegations, alleged facts, and/or reports," the information is not necessary or relevant to his work function, and it could "potentially" cause him damage if discovered by third-parties. On that basis, he demands the sanitization of this information from all Entergy records or documents and, further, seeks to have all documents other than those type of records kept in the regular course of business, i.e., his job application form, his annual performance evaluations, removed from his file. Accepting these allegations as true and applying Louisiana law as derived from custom, we find the face of Doe's petition does not state a cause of action. Thus, the trial court did not err in granting Entergy's exception.

LSA-C.C.P. art. 934 directs that a judgment sustaining the peremptory exception shall permit amendment to the petition when the grounds of the objection may be removed by amendment. *Whitney Nat. Bank v. Jeffers*, 573 So. 2d 1262 (La. App. 4th Cir. 1991); *Reed v. Yor-Wil, Inc.* 406 So. 2d 236 (La. App. 1st Cir. 1981), *writ den.*, 410 So. 2d 1135 (La. 1982). Amendment, however, is not permitted when it would constitute a vain and useless act. *Whitney Nat. Bank v. Jeffers, supra.; Gibbs Construction Co., Inc. v. Board of Sup'rs of L.S.U,*. 447 So. 2d 90 (La. App. 4th Cir. 1984). The trial court's ruling did not permit

amendment. We do not find the ruling manifestly erroneous on that basis, however, because the right to amend is qualified by the restriction that the objections to the petition must be curable and the decision to allow amendment is within the discretion of the trial court. *Whitney Nat. Bank v. Jeffers, supra.* Doe has not alleged additional facts which would constitute a cause of action. Thus, it has not been shown that the trial court abused its discretion.

Doe's second contention is the trial court erred in quashing his motion for production of documents. The trial court did not quash the motion. As previously stated, the trial court found that sustaining the peremptory exception rendered the motion moot. After our review, it remains moot.

For the foregoing reasons, the judgment dismissing Doe's suit at his cost is affirmed.

AFFIRMED.

APPENDIX D — JUDGMENT, CIVIL DISTRICT COURT, PARISH OF ORLEANS, STATE OF LOUISIANA DATED OCTOBER 7, 1991

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 91-14479 DIVISION L

NORMAN DOE

versus

ENTERGY SERVICES, INC.

JUDGMENT

This matter came for trial on the defendant's exception of no cause of action and motion to quash production of documents. The plaintiff can cite no law which authorizes the relief sought, his argument being based upon equity. In the absence of positive law, the defendant must prevail.

IT IS ORDERED, ADJUDGED AND DECREED that the exception of no cause of action filed by Entergy Services, Inc. is granted and, accordingly, this suit is dismissed at plaintiff's cost; the motion to quash is therefore moot.

Judgment read, rendered and signed at New Orleans, this 7th day of October, 1991.

s/ Max N. Tobias, Jr.
Judge

Supreme Court, U.S.
FILED
JUN 17 1993
OFFICE OF THE CLERK

No. 92-1842

In The

Supreme Court of the United States

October Term, 1992

NORMAN DOE,

Petitioner,

vs.

ENTERGY SERVICES, INC.,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Louisiana

BRIEF IN OPPOSITION

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LIST OF PARTIES

Pursuant to Supreme Court Rule 29.1, the Respondent, Entergy Services, Inc. herewith states that it is a wholly owned subsidiary of Entergy Corporation, 225 Baronne Street, New Orleans, LA 70112.

Otherwise, the Petitioner's List of Parties on page ii of the Petition for Writ of Certiorari is an accurate representation of the interested parties to this dispute.

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Louisiana Code of Civil Procedure, Article 921 ....1, 10

Louisiana Code of Civil Procedure, Article 927 .....1, 3

Judiciary and Judicial Procedure, 28 U.S.C. § 1254(1) 2, 6

Judiciary and Judicial Procedure, 28 U.S.C. § 1257 ..... 2, 6, 8

STATUTES INVOLVED

Louisiana Code of Civil Procedure, Article 921, which reads as follows:

> Art. 921. Exception defined
>
> An exception is a means of defense, other than a denial or avoidance of the demand, used by the defendant, whether in the principal or an incidental action, to retard, dismiss, or defeat the demand brought against him.

Louisiana Code of Civil Procedure, Article 927, which reads in part as follows:

> Art. 927. Objections raised by peremptory exception
>
> The objections which may be raised through the peremptory exception include, but are not limited to, the following:
>
> (1) Prescription;
>
> (2) Res judicata;
>
> (3) Nonjoinder of an indispensable party;
>
> (4) No cause of action; and
>
> (5) No right of action, or no interest in the plaintiff to institute the suit.

Federal Rules of Civil Procedure, Rule 12, which reads in part as follows:

> Rule 12. Defenses and Objections - When and How Presented - By Pleading or Motion - Motion for Judgment on Pleadings
>
> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading,

whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) **failure to state a claim upon which relief can be granted** . . . (Emphasis added)

28 U.S.C. § 1257, which reads in part as follows:

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1254, which reads as follows:

§ 1254. Court of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

COUNTERSTATEMENT OF THE CASE

This case arises out of the dismissal of petitioner's lawsuit by the Civil District Court of the Parish of Orleans on the basis of a Louisiana procedural mechanism referred to as a peremptory exception of no cause of action. The trial court concluded on the exclusive basis of Louisiana state law and long established Louisiana procedural rules that the petitioner's suit should be dismissed and the defendant's exception should be granted as no positive law of any kind recognized in the state of Louisiana would afford any relief to the plaintiff.

In reaching its conclusion, the trial court, as required by Louisiana Code of Civil Procedure Art. 927, was bound to consider all of the facts alleged by the petitioner as true for the purpose of trying the exception. In Louisiana, the peremptory exception of no cause of action tests solely the legal sufficiency of the petition and does not entertain the presentation of any factual evidence other than the facts as alleged by the petitioner. The Fourth Circuit Court of Appeal aptly summarized the procedural construction applicable in a peremptory exception of no cause of action. The court described the process by which

the exception is tried on the face of the pleadings accepting the facts alleged in the petition as true. Petitioner's Brief, Appendix C at 10a; *Smith v. Cole*, 553 So. 2d 847, 855 (La. 1989). In fact, it is also commonly accepted that to do substantial justice, any doubt must be resolved in favor of the sufficiency of the petition. *Massey v. G. B. Cooley Hos. for Retarded Citizens*, 593 So. 2d 460, 462 (La. App. 2d Cir. 1992), writ granted 596 So. 2d 198 (La. 1992). The peremptory exception of no cause of action is analogous to a motion to dismiss based on Federal Rule of Civil Procedure 12(b)(6).

The dismissal of the petitioner's suit by the trial court was subsequently affirmed by the Louisiana Fourth Circuit Court of Appeal. In its decision, which is reported at 608 So. 2d 684 (La. App. 4th Cir. 1992), the Fourth Circuit clarified the effect of the lower court's decision.

The appellate court recognized that the peremptory exception granted by the trial court did not expressly permit amendment. The Fourth Circuit discussed the propriety of the trial court not explicitly permitting amendment and concluded that while amendment is mandatory when the grounds of objection may be removed by amendment, in this case amendment would not be permitted when that exercise would be vain as per Louisiana civil procedure and jurisprudence.

However, it must be noted that, despite the clarity of statement by the Louisiana Fourth Circuit Court of Appeal in affirming the lower court's dismissal with prejudice, petitioner has filed an amendment to his initial petition. *See* Respondent's Brief, Appendix at 4. The amended petition was filed on December 4, 1992, and

remains undecided at this time. The amending petition reiterates many allegations previously articulated in the first petition. By amending his petition, Doe seeks to relitigate his case in state court while simultaneously applying for review by this Honorable Court. Further, the amendment of the petition procedurally flaws the petitioner's attempt to seek review by this Honorable Court in that the petitioner has thereby impaired the finality of the judgment before this Court. In fact, because of his filing an amendment in state court, petitioner does not have a valid final judgment and should be required to continue with his case in the state courts of Louisiana. The respondent, herein, has been faced with what is tantamount to vexatious litigation by petitioner's filing a procedurally improper amendment without leave of court. Respondent will consider filing another peremptory exception not only reurging a peremptory exception of no cause of action but also asserting res judicata. The petitioner's amended petition vitiates the finality of the prior decision which was affirmed by the Louisiana Supreme Court in its denial of certiorari.

Neither the decision by the Civil District Court for the Parish of Orleans, nor the Fourth Circuit's affirmance thereof, address in any way the issue of personal security or the abridgement or violation of due process rights. The absence of any discussion of the rights of personal security or the violation of due process results from the absence of those issues in the petition. These issues were never raised by petitioner who at this point in the case attempts to create a federal issue of law where none was ever previously asserted at any prior stage of the proceedings.

JURISDICTION

The petitioner erroneously states that jurisdiction is properly sought under the terms of 28 U.S.C. § 1254(1). Petitioner's reliance on § 1254(1) is not appropriate insofar as that section is the applicable jurisdictional basis for review of federal cases decided by a federal appellate court. The matter which petitioner presents before this Court has been adjudicated by the Louisiana Fourth Circuit Court of Appeal, and the Supreme Court of the State of Louisiana denied a writ of certiorari. The case before this Court has followed a traditional procedural path through the avenues of Louisiana's state courts. As federal courts have never been involved in any aspect of the case, the jurisdictional basis invoked by the petitioner is inapplicable and petitioner's jurisdictional basis is misstated.

However, for the sake of completeness, respondent acknowledges that federal jurisdiction may be appropriate in a case that was initiated in a state court and ultimately decided by the highest court of a sovereign state. Jurisdiction in cases litigated in state court may, under proper circumstances, be asserted under 28 U.S.C. § 1257. Petitioner raised issues of the constitutionally protected right of personal security and the violation of due process for the first time in his petition for review by this Honorable Court. However, it should be noted that the instant case should not be reviewed by this Court because petitioner failed to raise any issue of federal due process at any other stage of the proceedings. Hence, under generally accepted rules, the matter before this Court is not appropriately reviewable in that petitioner's

claim of infringement of constitutionally protected due process rights is not timely.

SUMMARY OF THE ARGUMENT

The petitioner's application for review should be denied on the basis of (a) failure to raise any federal issues in a timely manner, (b) lack of finality of a judgment at the lower court, and (c) adequate and independent state law to support the decision at the lower court.

Additionally, petitioner has failed to demonstrate any infringement of federal due process rights.

REASONS FOR DENIAL OF THE WRIT

Certiorari Should Be Denied Because The Petitioner Has Not Met His Burden of Establishing That This Court Has Jurisdiction.

1. Petitioner's failure to raise federal issues in the lower court should render the matter unreviewable.

Prior to seeking a writ of certiorari, petitioner's lawsuit neither alleged that his right to a security interest had been impinged nor did he claim any violation of a constitutionally protected right to due process. These claims are de novo and therefore should not be considered on the basis of lack of timeliness. In essence, no federal claim was presented at any stage of the proceedings. The lack of timeliness in raising a federal question should render the petitioner's case unreviewable by this Court. The failure to raise the federal issues earlier in the

proceeding should result in the preclusion of review. Traditionally, it has been held that this Court will not consider for review federal issues that were not brought at the court below. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 72 (1988); *Clark v. Jeter*, 486 U.S. 453, 460 (1988).

It is well settled that in reviewing judgments issued by state courts under the jurisdictional basis of 28 U.S.C. § 1257, this Court will not generally entertain claims that were not raised or otherwise addressed at the lower court. *Illinois v. Gates*, 462 U.S. 213, 218 (1983). As the petitioner had not raised any federal issues at the lower court, none of the prior decisions rendered in this matter even considered a federal question. Hence, this Court has no jurisdictional basis to support review of matters not presented to the court below. The federal questions which are now urged are simply not timely.

2. The case was solely decided on state law and as such should not be reviewed as the matter rests on state grounds alone.

Petitioner's lack of jurisdiction is supported by other bases which are well established. The Court has long held that review of a state case will not be appropriate when the state court's decision is based on adequate and independent state grounds. A state court decision that is based on state law that is both adequate and independent will not be reviewed by this Court. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983); *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990).

The Court has acknowledged its respect for the independence of the sovereign state in matters where a state court decision has strictly interpreted and applied state law. *Michigan v. Long*, supra at 1041.

In the case before the Court, the decision of the Louisiana Fourth Circuit Court of Appeal rested entirely on an interpretation of the Louisiana Civil Code and Louisiana statutory law. The issue correctly decided by the Court of Appeal pertained to an employer's right to determine the contents and maintenance of employee personnel files. The Fourth Circuit unequivocally concluded that no clear statutory rules had been enacted by the state legislature with regard to the subject of maintenance and contents of an employer's personnel files on employees. Petitioner's Brief, Appendix C at 9a. However, consistent with the Louisiana Civil Code, the court rooted its decision in custom.

The Court of Appeal stated:

> It is also custom and, therefore, law that employers are entitled to document in an employee's personnel file the occupational conduct/misconduct, reprimands, counseling sessions, violations, complaints etc. of the employee.

Petitioner's Brief, Appendix C at 9a.

Clearly, the court's decision was based on the application of state law and no reference to or reliance on federal law was invoked. In reaching its decision entirely on Louisiana codal, statutory and decisional law, the adequacy and independence of the state court decision is unquestionable. Hence, this Court should recognize that the case

presented is purely a matter of state law and is outside of the scope of recognized federal jurisdiction.

Certiorari Should Be Denied Because The Petitioner Has Not Been Deprived of Due Process.

While the petitioner's application for a writ of certiorari is procedurally flawed in more than one aspect, this Court should not review this case in that petitioner has not been deprived of due process. Essentially, in granting the peremptory exception at the trial court, the sufficiency of the plaintiff's pleadings was tested. The purpose of the Louisiana Rule of Civil Procedure creating peremptory exceptions is to provide a defendant in a civil action with a means to defeat the demand brought against him. La. Code of Civ. Proc. Ann. Art. 921 (West 1993). Under Louisiana procedural rules no evidence of any kind may be introduced during the trial of the peremptory exception. The pleadings filed by the petitioner were considered as true for purposes of trying respondent's exception at the trial court level. The peremptory exception is a well recognized procedural tool. One of the purposes of the exception of no cause of action is to allow the court to determine the issue of whether the law grants a remedy for the particular harm alleged by a plaintiff. The court, in deciding a peremptory exception of no cause of action, is deciding a purely legal question in which the court need not entertain any facts in order to reach its conclusion. As all of the petitioner's facts as alleged were accepted as true, petitioner neither suffered any harm nor lack of due process by the court's utilization of the traditionally accepted procedural tool of the peremptory exception. In fact, not only were all of the

facts of the petition accepted as true for the adjudication of the peremptory exception of no cause of action, but also all doubts were to be resolved in favor of the sufficiency of the petition. While petitioner had his day in court, he claims deprivation of due process because he has a fundamental disagreement with the procedural rules of the state of Louisiana. The petitioner's attack on the peremptory exception is analogous to an argument that Rule 12(b)(6) of the Federal Rules of Civil Procedure allowing a motion to dismiss for failure to state a claim is an infringement of due process rights. There is no valid due process argument in petitioner's assertion that his right to personal security and his due process rights were impinged by the dismissal of his claim. In fact, in *Paul v. Davis*, 424 U.S. 693 (1975), it was held that the Fourteenth Amendment does not single out an individual's reputation for special protection greater than other interests that may be protected by state law. Petitioner has not been able to demonstrate the applicability of due process arguments.

In this case, the petitioner is simply dissatisfied with the result of a court decision focusing on a purely legal issue decided by a Louisiana state court in its application of both Louisiana substantive law and procedure. Not only is petitioner's claim devoid of any federal due process validity but it is absent any recognized protected right of due process.

CONCLUSION

It is respectfully submitted that petitioner has failed to sustain his burden of establishing that this Court should take jurisdiction. Hence, the Writ of Certiorari should be denied. The matters decided by the Louisiana appellate court expressly addressed matters limited to state law and there are adequate and independent grounds. The petitioner failed to timely raise any question of federal law. Accordingly, petitioners have not demonstrated any basis on which this Court should exercise its judicial discretion and entertain this case. The petitioner's petition for a Writ of Certiorari should be denied.

Dated: June 17, 1993

Respectfully submitted,

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Telephone: (504) 569-4375

MICHAEL G. THOMPSON
On the Brief

Counsel for Respondent

ATTORNEY'S NAME: Schmitt, Earl J., Jr. Esq. 10112
AND ADDRESS: 5113 Fourth Street
Marrero LA 70072

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 91-14479 DIVISION L

DOE, NORMAN
vs.
ENTERGY SERVICES, INC.

CITATION

TO: ENTERGY SERVICES, INC.
THROUGH: ITS AGENT, ELENA GOLETZ
639 LOYOLA AVE.
N. O. LA.

YOU HAVE BEEN SUED:

You must either comply with the demand contained in the petition AMENDING, a certified copy of which accompanies this citation, or file an answer or other legal pleading in the office of the Clerk of this Court, Room 402, Civil Courts Building, 421 Loyola Avenue, New Orleans, LA, within fifteen (15) days after the service hereof under penalty of default.

****

ADDITIONAL INFORMATION

Legal assistance is advisable. If you want a lawyer and can't find one, you may call the New Orleans Lawyer Referral Service at 561-8828. This Referral Service operates in conjunction with the New Orleans Bar Association. If you qualify, you may be entitled to free legal assistance through the New Orleans Legal Assistance Corp.; you may call 529-1000 for more information. COURT PERSONNEL ARE NOT PERMITTED TO GIVE LEGAL ADVICE.

****

IN WITNESS HEREOF, I have hereunto set my hand and affix the seal of The Civil District Court for the Parish of Orleans, State of LA December 4, 1992.

Clerk's Office, Room 402,
Civil Courts Building
421 Loyola Avenue
New Orleans, LA

DALE N. ATKINS, Clerk of
The Civil District Court for
the Parish of Orleans State
of LA

by /s/ [Illegible Signature]
Deputy Clerk

SHERIFF'S RETURN:
(for use of process servers only)

PERSONAL SERVICE

On this ___ day of _____ 19 ___ served a copy of the w/i petition AMENDING On ENTERGY SERVICES, INC.

_____ in person through ITS AGENT, DANE E. STAPP

Returned same day

No. _____

Deputy Sheriff of _____

Mileage: $_____

ENTERED

_____ PAPER _____ RETURN

_____ SERIAL NO. _____ DEPUTY

_____ PARISH

DOMICILIARY SERVICE

On this ___ day of _____ 19 ___ served a copy of the w/i petition AMENDING On ENTERGY SERVICES, INC.

____ through ITS AGENT, DANE E. STAPP by leaving same at the dwellinghouse, or usual place or abode, 639 LOYOLA AVE. N. O. LA. in the hands of _____ a person of suitable age and discretion residing therein as a member of the domicillary establishment, whose name and other facts connected with this service I learned by interrogating HIM/HER the said ENTERGY SERVICES, INC. ____ being absent from the domicile at time of said service.

Returned same day

No. _____

Deputy Sheriff of _____

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NORMAN DOE

VERSUS

ENTERGY SERVICES, INC.

NUMBER: 91-14479 DIV: L

FILED: _____ _____
DEPUTY CLERK

AMENDING PETITION BEFORE ANSWER SERVED

The supplemental and amending petition of Norman Doe, plaintiff in the above captioned matter, respectfully represents that the plaintiff desires to supplement and amend his original petition filed herein on August 5, 1991, in the following respects:

I[sic] By adding the following additional paragraphs following paragraph 13 to be numbered as below:

14

Petitioner has been denied the right to obtain and copy his employment records.

15

Petitioner has been denied the right to file in his employment file and/or other records of his employer, his version of any alleged wrongs.

16

Petitioner has been denied the right to have any false or "false and scandalous material s[sic]" mentioning his name removed from his employer's records.

17

Defendant has within petitioner's personnel files false conclusions or allegations of wrong doing which allegedly occurred miles away from the work site and outside the course and scope of employment of the petitioner; petitioner asks that these be removed.

18

Petitioner has been denied the right to receive notification prior to the disbursement to third parties any corporate records referencing his name.

19

Petitioner desires that the court order defendant to grant to petitioner any and all of the rights urged in the original or amended petitions.

Wherefore, petitioner, reiterating the prayer of his original petition as though set forth herein, prays that his original petition be supplemented and amended in the above particulars and that, after due proceedings had, there be judgment herein in favor of the petitioner, Norman Doe and against the defendant Entergy Services, Inc. (employer), as originally prayed for herein and additionally that

7. Petitioner is granted authority to obtain and copy his employment records.

8. Petitioner is granted authority to file in his employment file and/or other records of his employer, his version of an alleged wrong.

9. Petitioner is granted authority to have any false or "false and scandalous material s[sic]" mentioning his name removed from his employer's records.

10. Petitioner is granted authority to have removed from his employer's records any false conclusions or allegations of wrong doing which allegedly occurred miles away from the work site and outside the course and scope of employment of the petitioner.

11. Petitioner is granted authority to receive from his employer notification prior to the disbursement to third parties of any corporate records referencing his name.

12. The court order defendant to grant to petitioner any and all of the rights urged in the original or amended petitions.

Submitted by:

/s/

Earl J. Schmitt, Jr. 10112
Attorney for petitioner
5113 Fourth Street
Marrero, LA 70072
(504) 347-4959

PLEASE SERVE:

ENTERGY SERVICES, INC. THROUGH ITS AGENT FOR SERVICE:

DAN E. STAPP
639 LOYOLA AVE.
N.O., LA. 70113

CERTIFICATE

I certify that I have served a copy of the above and foregoing on the attorney for defendant by US mail this 2nd day of December, 1992.

/s/

Earl J. Schmitt, Jr.